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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962 1963

No. 223

THOMAS EISTRAT,

Petitioner,

vs.

IRVING LUMBER & MOULDING, INC.; ASSOCIATED LUMBER PRODUCTS COMPANY, a partnership; and FRED GEORGE HUMISTON,

Defendants and Respondents.

Appeal From and Petition for a Writ of Certiorari to the District Court of Appeal, Fifth District, State of California.

THOMAS EISTRAT,
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Alhambra, California,
Petitioner.

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Appeal From and Petition for a Writ of Certiorari to the District Court of Appeal, Fifth District, State of California.

Thomas Eistrat appeals from and prays that a writ of certiorari issue to review the judgment of the District Court of Appeal, Fifth District, of the State of California entered in above-entitled case on November 30, 1962.

Citation to Opinions Below.

The judgment of the trial court of dismissal without trial is unreported, but included in the certified record. The judgment and opinion of the District Court of Appeal in 5 Civil 135 is printed in Appendix A hereto, is reported in 210 A. C. A. 440. The denial without opinion of the motion for writ of error *coram nobis*

in 3 Civil 135, heard and entered May 14, 1963 is reported in 216 A. C. A., Minutes p. 12; and the proceedings thereon included in the certified record herein. The denial of petition for hearing in the Supreme Court on January 23, 1963 is included in the certified record. The denial without opinion of the motion for writ of error *coram nobis* in 4 Civil 7401, heard and entered June 5, 1963 and the proceedings are included in the certified record.

Jurisdiction.

The judgment of the District Court of Appeal, Fifth District, was entered November 30, 1962. Petition for rehearing was denied without opinion December 28, 1962. Petition for hearing in the Supreme Court denied without opinion January 23, 1963. Petition for extension of time in which to file this petition for writ of certiorari granted by Mr. Justice Douglas of the United States Supreme Court from April 22, 1963 to and including June 22, 1963.

The jurisdiction of this Court is invoked under 28 U. S. C., sec. 1257(1)(3).

Questions Presented.

The questions presented on this appeal relate to the jurisdiction of this Court to re-examine the final judgment of the highest court in California in which appeal could be had; and to examine the rulings of the state court that disregard that part of the Fourteenth Amendment declaring no State shall deprive any person of his property without due process of law, or deny equal protection of the laws to any person within its jurisdiction.

Constitutional Provisions Involved.

The constitutional provision involved is the 14th Amendment of the United States Constitution. The portion involved is:

> "nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

Presentation of the Federal Question.

After the trial court granted motion to dismiss without trial, petitioner in his written motion for new trial as grounds claimed that the court deprived him of his property without due process and without equal protection of law contrary to the 14th Amendment of the United States Constitution [augmented C. T. p. 7].

When the trial court overruled the motion for a new trial and entered judgment it necessarily held adversely to these claims of Federal right (*Chicago, Burlington, etc. v. Chicago*, 166 U. S. 226, 231).

But this is not all. In the assignment of errors filed by petitioner in the District Court of Appeal, Fifth District, State of California, these claims of rights under the Constitution of the United States were distinctly reasserted and he specifically requested the appellate court "to rule upon this important federal question" (Op. Br. pp. 25-26). Again in his petition for rehearing he specifically asserted the federal question and requested ruling thereon (Pet. for Rehrg. pp. 2, 18, 21, 22, 23). Again in his petition for hearing before the Supreme Court the federal question was distinctly raised and ruling requested (Pet. for Hrg. pp. 1, 2, 17, 18, 19). Again the Federal question was

raised in motions for writ of error *coram nobis*. The judgment of affirmance or denial of hearing necessarily denied the Federal rights thus specifically set up by petitioner; for that judgment or denial of hearings could not have been rendered without deciding adversely to such claims of right. There is no room to doubt that the legal effect of the judgment below was to declare that the rights asserted by the petitioner under the National Constitution were not infringed by the proceedings in the case, and that the United States Supreme Court has jurisdiction (*Chicago, Burlington etc. v. Chicago*, 166 U. S. 226, 232).

Statement.

On April 28, 1951 petitioner sold an option to William I. Humiston, agent of undisclosed principals respondent corporation, partnership and partner herein.

The terms of the option provided that the optionee pay $35,000, plus forest fire hazard removal, plus fulfillment of all terms of a cooperative timber sales operating conditions agreement that petitioner would make with the U. S. Forest Service for public and private benefit. The option agreement also provided that time was of the essence for each and every provision of the agreement, and that no right to cut any timber, nor any title should pass, in the event there was any default in the payment of the $35,000, or failure to comply with the operating conditions, or assignment of the option. The option agreement and the U. S. Forest Service agreement that was made are attached as Exhibits "A" and "B" to the motion for writ of error *coram nobis* heard June 5, 1963 by the District Court of Appeal, Fourth District, and forwarded as part of the certified original record herein.

Five months, later, on October 5, 1951, petitioner filed action 42418 in the Superior Court of Tulare County against William I. Humiston and respondents herein alleging default in the option agreement and no right of any of them to have taken or kept any of the timber products cut and removed by them.

In substance by the 2nd, 3rd, 4th, 6th, and 7th amended complaints in 42418, petitioner plead the following issues:

> That William I. Humiston never took any of petitioner's timber products, but that respondents as undisclosed principals took the timber products without petitioner's consent, were undisclosed principals, *alter egos*, unjustly enriched thereby, and petitioner damaged thereby.

The entire files in 42418 are in evidence as an exhibit to be part of the certified record herein. Extracts therefrom to show such pleading, quoting by line and page, are attached as Exhibit "B" to the motion for writ of error *coram nobis* heard June 5, 1963 by the District Court of Appeal, Fourth District; and also in the petition for rehearing before the District Court of Appeal, Fifth District.

On about January 12, 1954, respondents filed petition for writ of prohibition against the Superior Court appealing from the December 29, 1953 order by Judge Machetanz adjudicating that these undisclosed principals were proper parties joined as defendants with leave of court pursuant to law.

On January 19, 1954 the District Court of Appeal, Fourth District, entered its order in 4 Civil 4662 against the undisclosed principals as follows:

"The petition for a Writ of Prohibition is denied." Copy of said order is attached as Exhibit "D" to the motion for writ of error *coram nobis* heard June 5, 1963 by said court, and forward as part of the certified original record herein.

Leave of court having again been granted, petitioner served and filed his 7th amended complaint on respondent on January 25, 1954.

On February 4, 1954 respondents again made motion to dismiss, asserting two knowingly false grounds that: (a) "said complaint is fictitious and sham" as to the corporation, partnership and Fred George Humiston, and (b) "That plaintiff has previously dismissed said action as against said defendants and said dismissal has not been vacated or set aside."

Entirely absent from respondents motion was the affidavit required to be made and filed with the application for the order showing that the Petition for Writ of Prohibition had been by them made to the District Court of Appeal and had been denied. No mention of C. C. P. sec. 1008, nor of *Johnston v. State Bar*, 10 Cal. 2d 212, 214, 215, was made in respondents renewed application (failure to disclose subjects the applicant to contempt of court and vacation of the order obtained).

Judge Stone, not Judge Machetanz heard that renewed motion to dismiss, and being unaware of the concealment of the District Court's order of denial, and relying upon the wilful misrepresentation of the record

by respondents, made an order granting their dismissal. The April 2, 1954 order states:

> "Defendants' motion for dismissal as to defendants Irving Lumber & Moulding, inc., Associated Lumber Products Company, a partnership, and Fred George Humiston, is granted. Plaintiff previously filed a Dismissal as to said defendants and have not secured leave of Court to again join them as defendants."

Judgment of dismissal as to respondents was prepared by them as defendants in 42418 and entered April 15, 1954.

In wrongfully obtaining their dismissal from 42418, respondents in effect represented to the court that if petitioner were to sue them in conversion that they would not plead that any decision or finding in 42418 would be *res judicata* in their favor—that their only defense would be that they never took any of the timber or timber products from petitioner's land or under any agreement with William I. Humiston.

Petitioner on June 30, 1954 filed actions 46890 and 46891 in that Superior Court against respondents, alleging only minimum allegations in conversion. The only defense then filed was an answer of general denial. A separate action solely on the balance due on the promissory note given as part of the purchase price of the option was filed against William I. Humiston. He cross-complained alleging wrongful termination of contract, and a defense of failure of consideration.

On June 3, 1955 a motion to consolidate all four cases together for trial was heard and denied by Judge Machetanz because respondents refused to accept a

stipulation that they be bound by any judgment as to title that might be made in 42418, because depositions of respondents had not been completed, and because the issues of respondents being undisclosed principals, unjust enrichment, and *alter egos,* were not then in any of the pleadings—having been withdrawn by respondents' maneuvers of their wrongfully obtained dismissal from 42418.

Trial on the merits in 42418 was only had on the issue in the cross-complaint as to wrongful termination of the option agreement, and respondents were not parties during the trial, nor were there then any pleadings of issues as to them before the court.

The court in 42418 repudiated the express wording of the option agreement and found it was not an option agreement. The court did not apply the established law in California that since none of the timber was cut within the time specified in the option agreement, no title to the timber cut passed when it was cut after the specified time (*Mallett v. Doherty,* 180 Cal. 225, 229; *Whittaker v. Thompson,* 53 Cal. 2d 192).

Respondents, while having prevented their joinder during trial, and also any issues as to undisclosed principals and unjust enrichment being presented or tried in 42418, did take the assets of William I. Humiston so that a judgment against him would be worthless. Nothing has ever been paid petitioner on that portion of the judgment in his favor.

Petitioner later filed notice of partial appeal so that inaccurate findings not fully tried might be corrected and "maneuvers" by the respondents to obtain some

advantage from the judgment in 42418 without any of the burdens might be avoided in conversion action 46890 and 46891 against them. Petitioner was advised that under the circumstances respondents could not use 42418 as a valid defense to the conversion actions. They had not been mentioned in either the trial court's findings in 42418, or in the judgment, or in 4 Civil 5392 on appeal to the Fourth Appellate District (The Fifth Appellate District is newly created). It appeared reasonable that under *Lunsford v. Kosanki*, 140 Cal. App. 2d 623, and *Hall v. Coyle*, 38 Cal. 2d 543, that considering the past conduct of respondents that no court would subsequently allow them to repudiate their past representations to the court and use the rule of *res judicata* as a sword for unjust enrichment and a shield for the concealment of their misconduct, while preventing any trial whatsoever on issues of unjust enrichment, and undisclosed principals.

On July 5, 1962, after many written waivers of right to dismissal because of continuances, these conversion actions came on for trial. No trial was had. Motion to then dismiss on the ground that 42418 was *res judicata* in their favor was granted by Judge Meyers.

In opposing that motion, petitioner made offer of proof that respondents

> "were unjustly enriched because they caused themselves to be dismissed from the prior action 42418, that they prevented an effective trial or determination of an issue of unjust enrichment in action 42418, that they should have been bound and should be bound by the judgment against William I. Humiston in action 42418—".

The objection by respondents that it would be incompetent, irrelevant and immaterial to the issues was sustained.

In opposing that motion to dismiss, petitioner also argued that trial of the issues against respondents as defendants in 42418 was prevented by respondents then concealing and misrepresenting the record to the court. Respondents there again concealed and misrepresented the record, and the trial court relied upon respondents' misrepresentations in dismissing these actions without trial [R. 29:21 to 31:18].

On appeal to the Fifth District Court of Appeal, petitioner raised the issue that:

> "The trial court has denied plaintiff the opportunity to be heard on substantial material facts by sustaining respondents' objections to the offers of proof, and by dismissing these conversion actions without trial on the merits or at all, thereby depriving him of his property without due process of law and, thereby denying him his constitutional rights as guaranteed him by the fourteenth amendment of the United States Constitution." (Op. Br. pp. iii, 25, 26).

The final judgment and opinion of the California state courts upholding the dismissal without any trial is expressed in the November 30, 1962 order of the District Court of Appeal, Fourth District, attached hereto as appendix "A". The judgment upholding dismissal without trial is substantially founded on the following clearly erroneous statement. The statement is without any support in the record and expressly

contrary to the record. The judgment states that no issues:

> "that respondents took the timber products without appellant's consent and that respondents are undisclosed principals and were unjustly enriched"

were ever presented in original 42418, and that they were not presented until the July 5, 1961 motion to dismiss was heard.

This final judgment and opinion of the California state courts upholding the dismissal without any trial also states: "We do not think that the respondents were guilty of any fraud or "maneuvers" or that the appellant was misled in any way, considering all of the proceedings taken in No. 42418. The court has not equally applied the law to petitioners case as set forth in *Johnson v. State Bar*, 10 Cal. 2d 212. A unanimous decision of the Supreme Court in that case held that when an application for an order was made, a failure to show by affidavit the previous denial of a similar application was a contempt of court. It was there stated that "it is obvious that the statement was deceptive, dishonest, and untruthful, and was deliberately made with the intention of giving an impression that was not correct." Respondents profited by their concealment of the order of the Fourth District Court of Appeal denying writ of prohibition. By so doing they were dismissed from 42418 and all issued as to them effectively prevented from being tried, and they thereby unjustly enriched.

This final judgment of the California state courts is also founded on unequal application of the law in not applying the rule in California to petitioner's case

that no title to timber cut passes when it was cut after the specified time for cutting (*Mallet v. Doherty*, 180 Cal. 225, 229; *Whittaker v. Thompson*, 52 Cal. 2d 192).

This final judgment of the California state courts is also founded on denial of due process in not applying the established law in California to petitioner's case that the rule of *res judicata* cannot be used when the parties subsequently take an inconsistent position (*Lunsford v. Kosanki*, 140 Cal. App. 2d 623; *Hall v. Coyle*, 38 Cal. 2d 543).

REASON FOR GRANTING THE WRIT.

The court below has decided a federal question in conflict with applicable decisions of this Court and has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. Granting this writ is of great benefit to all citizens who abhor discrimination and unequal protection of the law.

The court below has clearly denied petitioner any trial, right to recover his property, or damages because of its finding that is wholly without support in the record that:

> No "issues" were "presented in the original No. 42418" "that respondents are undisclosed principals and were unjustly enriched".

Likewise the court below has denied any trial because of its finding wholly without support in the record that:

> "Respondents were not guilty of any fraud or 'maneuvers' or that the 'appellant was misled in any way.".

By petition for rehearing, petition for hearing in the Supreme Court, and by motion for writ of error *coram nobis* those wholely unsupported findings of the appellate court were set forth as being both erroneous and contrary to the record on appeal, and as being the basis for the erroneous denial of rights to property protected from state infringement by the Fourteenth Amendment. No correction to conform to the truth of the record was made.—

This Court has said:

> "And this Court will review the findings of facts by a State court where a federal right has been denied as the result of a finding shown by the record to be without evidence to support it; or where a conclusion of law as to a federal right is so intermingled as to make it necessary, in order to pass upon the Federal question, to analyze the facts. Northern Pacific Railway v. North Dakota, 236 U. S. 585, 593; Aetna Life Ins. Co. v. Dunken, 266 U. S. 389, 394; and cases cited" *Fiske v. Kansas*, 274 U. S. 380, 385, 386.

The question of denial of rights to an opportunity to be heard on the merits is a right safeguarded to all by the Fourteenth Amendment. Circumvention of this right when duly raised and presented should not be made by any state court by making findings that are wholly without support in the record; and then not correcting the errors when duly presented.

The question of judgment of the highest state courts conforming to the truth of the record is of tremendous importance to good government and public morals. The judgment and opinion of the court below is harsh and unreasonable. That anyone should profit from improper maneuvers before a court runs counter to common and accepted ideas of good conduct.

It is respectfully submitted that there is here presented a proper occasion for the exercise of the supervisory power of this Court.

THOMAS EISTRAT,

Petitioner.

APPENDIX.

Opinion of the District Court of Appeal.

In the District Court of Appeal, Fifth Appellate District, State of California.

Thomas Eistrat, Plaintiff and Appellant, v. Irving Lumber & Moulding, Inc., Defendant and Respondent. Thomas Eistrat, Plaintiff and Appellant v. Associated Lumber Products, Defendant and Respondent. (Consolidated Cases.) 5 Civil No. 135.

Filed Nov. 30, 1962.

Appeal from a judgment of the Superior Court of Tulare County. Robert K. Meyers, Judge. Affirmed.

Thomas Eistrat, in propria persona, for Plaintiff and Appellant.

W. Floyd Cobb for Defendants and Respondents.

This is an appeal from a minute order which granted the dismissal of the above entitled actions. Thereafter a judgment of dismissal was entered from which the appellant moved for a new trial, which was denied, and the appellant filed another notice of appeal from the judgment of dismissal.

When the matter came up for oral argument the appellant and respondents stipulated in open court that the entire matter be heard and treated as one appeal, instead of successive appeals.

Appellant filed complaints against both of the respondents in Los Angeles County on June 30, 1954

(which were subsequently transferred to Tulare County), alleging his ownership and possession of certain land in Tulare County and asking damages for the alleged conversion of logs taken therefrom and converted into lumber.

On May 22, 1959, respondents filed a second supplemental answer to these complaints stating that a judgment in No. 42418, Tulare County (*Eistrat v. Humiston*, 150 Cal. App. 2d 391), had now become final and the matter was now res judicata and these actions should be dismissed because the complaints cover the same timber and title thereto.

The appellant, who then had an attorney, stipulated with the respondents that this motion to dismiss should be heard on July 5, 1961, and other matters relative to trial, but the appellant relieved his attorney and filed affidavits in opposition to the motion to dismiss. At this hearing a counter-declaration was filed by the appellant in opposition to the motion in which he declared that he does not now believe that the defendant Humiston in No. 42418 ever took any of appellant's lumber but believes that respondents took the timber products without appellant's consent and that the respondents are undisclosed principals and were unjustly enriched, none of which issues was tried or presented in the original No. 42418. The motion to dismiss was granted, the judge stating in his minute order that the rule of res judicata squarely applies and that said defendants are not estopped from asserting it. From this action comes this appeal.

Inasmuch as No. 42418 and No. 46892 (Tulare County) are connected with the present action we shall

refer to those actions as described and set forth in *Eistrat v. Humiston, supra*, 150 Cal. App. 2d 391, and the file in that action in the Tulare County Superior Court which was introduced and accepted as evidence in the present action.

Briefly, No. 42418 and No. 46892 were two suits filed by appellant herein against Humiston covering a certain contract dated April 28, 1951, which provided that, "Title shall pass to the party of the second part to that timber to be cut, at the time of its felling. . . ." and sued for the balance due on a promissory note. At one stage in the proceedings appellant named respondents herein as defendants, charging them with conversion of some of the logs. Ultimately, a motion to dismiss as to respondents herein was granted on April 2, 1954, from which order appellant did not appeal.

After these dismissals were ordered the appellant filed the present two actions against the respondents naming Humiston also as a defendant, but later dismissing as to him. There now being two suits against respondents herein and two suits against Mr. Humiston, motions by respondents to consolidate all four actions for trial were denied, though the two suits against Humiston were consolidated as well as the two suits against the respondents herein. Appellant points out in his brief that he told the court, ". . . I believe it would now be unfair to both the court and to plaintiff to now consolidate all four cases in one trial." He claims the statement was made because he was prevented from taking depositions in the matter now before us.

Appellant's suit against Mr. Humiston came on for trial where the lower court held that appellant had no right, title or interest in and to said logs or lumber involved therein, but awarded a judgment in favor of appellant in the principal sum of $19,157.46, plus interest and costs. This decision was appealed and affirmed in *Eistrat v. Humiston,* 150 Cal. App. 2d 391.* The details and the facts in connection with the contract with Humiston are discussed in the opinion, the court holding that title to the cut logs passed from appellant to Humiston when they were cut and that the agreement expressly provided that title passed at the time of the cutting.

Appellant's theme in his briefs and in his oral argument is based on his conception that the lower court in No. 42418 erred; that the appellate court was wrong in holding that title to the logs had passed to Humiston. Even assuming that the argument has merit, as was said in *Panos v. Great Western Packing Co.,* 21 Cal. 2d 636, 640, and quoted in *Olwell v. Hopkins,* 28 Cal. 2d 147, 152, "An erroneous judgment is as conclusive as a correct one."

Appellant further contends that the failure of the lower court to include the present respondents in action No. 42418 was error and that res judicata should not be applied in this action because of the "maneuvers" in No. 42418. He maintains that it was error for the court to remove respondents from that action; that all four actions should have been consolidated; and that if the matter is now reversed he could show that title

*Appellant also filed an appeal with regard to handling of matters of costs, etc., *Eistrat v. Humiston,* 160 Cal. App. 2d 89.

did not pass to Humiston even though he states that the lower court decision "was fairly made as to Humiston only."

Was the Timber the Same in No. 42418 as in the Present Action?

The record shows that the timber which was cut in action No. 42418 was and is the same timber that is involved in the conversion suit against respondents. In an affidavit filed by appellant dated November 9, 1954, he stated that Humiston cut timber on land owned by appellant, and that said timber became lumber and was transferred to respondents in this matter. He stated that he offered to stipulate that the action in No. 42418 be determinative and binding upon all of the respondents but that the respondents refused such stipulation. He also filed a notice of pending litigation dated September 10, 1954, addressed to the attorneys for Associated Lumber Products Company and others, which is one of the exhibits before us, in which he stated that there is now pending No. 42418 in Tulare County and that the judgment to be rendered therein may directly affect each and every respondent in this action by establishing that Humiston at no time had any title to any timber, logs or lumber from the property involved in No. 42418, as well as in the present actions, and that unless respondents intervene in said action that they may become bound by the judgment rendered therein quieting title.

One of the exhibits before us is a letter from Ellis D. Reiter, who was appellant's attorney from time to time, directed to respondents and dated May 4, 1960, stating, "This will advise you that the lumber (the

subject of this action) was made from timber cut from plaintiff's land as a result of the contract dated, I believe, April 28, 1951." However, in appellant's affidavit of November 16, 1959, he denies that the lumber was cut pursuant to the contract but does admit that the lumber was cut between June and November of 1951, which was before he filed action No. 42418, and thus, would not be affected by its decision (No. 42418).

Res Judicata as to Ownership.

Respondents' motion to dismiss on the basis of their answer setting forth the res judicata defense is proper (*Olwell v. Hopkins, supra*, 28 Cal. 2d 147; Code Civ. Proc., §597).

For an action in conversion it is necessary for the appellant to show that he has ownership of the timber with a right to, or actual, possession. (See *Eistrat v. Western Hardwood Lumber Co.*, 164 Cal. App. 2d 374.*) The appellant had neither ownership of the timber with a right to its possession nor actual possession of it because it had previously been held that Humiston had title to all this timber cut and he, in turn, had sold it so that respondents herein got either some or all of it.

In *Chatterton v. Boone*, 81 Cal. App. 2d 943, 946, the court said:

> "The gist of the action for conversion or trover is the wrongful interference with the owner's right of dominion and possession of his property. The motive with which the bailee exercises dominion or refuses the owner possession of property to which he is entitled is immaterial."

*Writ of certiorari denied in U. S. Supreme Court, 79 S. Ct. 807 [359 U. S. 979].

While it may be difficult for appellant to see how No. 42418 is adjudged and then have the conversion actions herein dismissed without trial on the ground that No. 42418 is res judicata, nevertheless, it is very clear and simple that when the court determined that Humiston had title to the same timber covered by No. 42418 and the present action, the appellant having no title himself cannot maintain a conversion action against the respondents, and whether this should have been in No. 42418 by consolidation or otherwise is immaterial.

Bernhard v. Bank of America, 19 Cal. 2d 807, 812, states the rule that, "There is no compelling reason, however, for requiring that the party asserting the plea of res judicata must have been a party, or in privity with a party, to the earlier litigation." Within this case is found a dissertation on the rule of mutuality and the requirement of privity. Here, the court said at page 813 that in determining the validity of a plea of res judicata there are three pertinent questions: (1) Was the issue decided in the prior adjudication identical with the one presented in the action in question? Title was found to be in Humiston in No. 42418, and not in appellant, and in our present action appellant is still claiming title by his action in conversion. (2) Was there a final judgment on the merits? The answer is, "Yes." (3) Was the party against whom the plea is asserted a party or in privity with a party to the prior adjudication? The answer is, "Yes." (See also *Fairchild v. Bank of America*, 165 Cal. App. 2d 477, 482.)

Appellant relies on *Hall v. Coyle*, 38 Cal. 2d 543, which cites *United Bank & Trust Co. v. Hunt*, 1 Cal.

2d 340, as to why he believes res judicata should not apply herein. In the latter case the court held at page 345 that, ". . . counsel who were successful in preventing the consolidation of the issues cannot be heard later to object to a trial of the related matters upon the ground of res judicata" and that, "[t]he course pursued . . . was tantamount to an express determination on the part of the court with the consent of opposing counsel to reserve the issues involved for future adjudication," and that res judicata was therefore not available as a bar. We do not think that this situation is comparable to the one before us. Appellant's claim against respondents is based entirely upon title to the timber which he did not have. Had the actions been consolidated, the first action to be tried would be that action against Humiston and if the court decided, as it did, that Humiston did have title, there could be no further proceedings against respondents. Had the court found that title did not pass, then the action could have proceeded against the respondents for conversion.

Appellant's contention that the issue of res judicata was reserved by the lower court in this action is immaterial because if the lower court in No. 42418 had found that appellant had title to the property he could have then proceeded against respondents for conversion of appellant's timber and the amount, if any, of damages which would be subject to proof thereof. This argument is immaterial, also, because success or failure depends upon who has title to the timber cut. Had the lower court found that appellant was the owner, the matter would then be res judicata as to Humiston's title.

"It is not necessary to establish mutuality and privity where the liability of the party asserting the plea of res judicata is dependent upon or derived from the liability of one who was exonerated in an earlier action brought by the same plaintiff upon the same facts." (*Loughran v. Reynolds*, 70 Cal. App. 2d 241, 244.)

The court, in *Nevarov v. Caldwell*, 161 Cal. App. 2d 762, 769, discusses the new concept of mutuality of estoppel and that there are rare instances when it is not applied so as to defeat the ends of justice, and that in determining the extent to which this state has gone in abolishing the test of mutuality of estoppel, it is necessary to keep in mind that the language used in any opinion is to be understood in the light of the facts and the issue then before the court.

The obligation that appellant seeks to enforce in conversion depends on his ownership and right to possession as set forth in No. 42418. The plea of res judicata relates not to the remedy or the relief sought, but to the right or obligation, as stated in *Stafford v. Yerge*, 129 Cal. App. 2d 165, 171; and there, the court further said, "If the second suit is based upon the same right or obligation as the first, the cause of action is the same even though different or additional relief is sought." (See also *Frost v. Whitter*, 132 Cal. 421, 426.). We do not think that the respondents were guilty of any fraud or "manetivers" or that the appellant was misled in any way, considering all of the proceedings taken in No. 42418.

Estoppel may be asserted by a stranger (3 Witkin, California Procedure, Judgment, §70, p. 1959). Derivative liability is an exception to the mutuality re-

quirement (3 Witkin, supra, p. 1900). One may not have the benefit of a judgment as an estoppel unless he would have been bound by it if it had gone the other way, subject to recognized exceptions such as tort actions (*C. H. Duell v. Metro-Goldwyn-Mayer Corp.*, 128 Cal. App. 376, 383). "Judgments are conclusive in later proceedings involving the same title or interest (*Seidell v. Anglo-California Trust Co.*, 55 Cal. App. 2d 913, 918). (See also 79 Cal. Jur. 2d, Judgments, §253, p. 217.)

In *Bauer v. Rynd*, 27 Cal. App. 556, 562, the court stated that successors in an interest in real or personal property in which title was an issue or adjudicated are concluded by a judgment for or against him from whom he derives his title. "One who purchases the subject of the dispute becomes entitled to the benefits of a judgment in favor of his vendor." (29 Cal. Jur. 2d, Judgments, §270, p. 241.)

Respondents did not waive their right to rely on res judicata. ". . . parties may rely on alternative grounds for relief without waiving either, and the rule applies in the case of res judicata." (29 Cal. Jur. 2d, Judgments, §282, p. 259.)

We think that the court properly sustained an objection to the appellant's offer of proof at the time the motion to dismiss was heard. At the hearing the appellant made an offer to prove that the respondents were unjustly enriched because they were dismissed from the prior action, No. 42418, and thus prevented an effective trial or determination on that issue, and that they should be bound by the judgment in No. 42418.

Other contentions of the appellant as stated in his brief, without discussion or citations of supporting authorities, are entitled to no further comment for they are deemed to have been abandoned. (Guillory v. Godfrey, 134 Cal. App. 2d 628, 634.)

The judgment is affirmed.

Brown, J.

I concur:

Conley, P. J.

(Stone, J., deeming himself disqualified, did not participate.)